No. 87-1732

In the Supreme Court of the United States

OCTOBER TERM, 1987

MARIE DUCHENEAUX, PETITIONER

v.

SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

Regulation – Continued:

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Petitioner contends that the court of appeals erred in holding that sovereign immunity barred her suit seeking to overturn the will of her estranged Indian spouse and in holding, in the alternative, that the will should not be overturned on the merits.

1. Petitioner, a non-Indian, is the widow of Douglas Leonard Ducheneaux, an enrolled member of the Cheyenne River Indian Tribe. During their marriage, petitioner and her husband acquired several tracts of property on the Cheyenne River Indian Reservation in Dewey County, South Dakota. Trust patents were issued to petitioner's husband under the General Allotment Act of 1887, 25 U.S.C. (& Supp. IV) 331 *et seq.*[1] Pet. App. 2a-3a,

[1] An Indian can receive a fee patent after 25 years, but the trust status of restricted lands can instead be continued indefinitely. See Indian Reorganization Act of 1934, 25 U.S.C. (& Supp. IV) 461 *et seq.*

14a-15a & n.1. The United States held legal title to the land, in trust for Mr. Ducheneaux. See 25 U.S.C. 465.

Petitioner and her husband separated in 1971 and remained separated when Mr. Ducheneaux died on April 11, 1980. Mr. Ducheneaux began divorce proceedings in 1971, but the proceedings were never completed. Both the state court hearing the divorce proceeding and a federal court in which petitioner initiated an action in 1972 held that they had no jurisdiction to divide the trust property. Pet. App. 3a, 15a-16a. In his will dated January 24, 1980, Mr. Ducheneaux left his entire estate to his brother's children, expressly disinheriting petitioner (*id.* at 16a-17a n.3). The will was probated by the Bureau of Indian Affairs within the United States Department of the Interior, and an order approving the will and issuing a decree of distribution (*id.* at 28a-37a) was filed pursuant to 43 C.F.R. Pt. 1.[2] Petitioner filed objections to the will, alleging that she was entitled to half of the land acquired during the marriage under a theory that the Secretary of the Interior (Secretary) held the land in constructive trust for her.[3]

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[2] Under tribal law, petitioner received an elective share of Mr. Ducheneaux's personal property amounting to $16,267.13. Under its bylaws incorporating 25 U.S.C. 464, the Cheyenne River Indian Reservation cannot approve devises of restricted land to individuals who are not heirs at law of the testator or members of the Tribe. See *Cultee* v. *United States*, 713 F.2d 1455 (9th Cir. 1983), cert. denied, 466 U.S. 950 (1984).

[3] At the time of petitioner's death, South Dakota had no mandatory widow's share statute, and a husband could therefore disinherit his wife of property to which he held sole title. (Later in 1980 the South Dakota Legislature passed an elective share statute, S.D. Codified Laws Ann. ch. 30-5A (1984).) In addition, South Dakota is not a community property state. Under South Dakota law in effect at the time in question, therefore, even if the land had been held by Mr. Ducheneaux in fee simple rather than by the United States in trust for Mr. Ducheneaux, petitioner would not have been entitled to any of the property.

Petitioner appealed unsuccessfully to the Interior Board of Indian Appeals (IBIA) (Pet. App. 38a-47a). She then filed suit in the United States District Court for the District of South Dakota. The government argued that the Quiet Title Act (QTA), 28 U.S.C. 2409a, shows that Congress intended to preserve the United States' sovereign immunity from suit by third parties challenging the United States' title to land held in trust for Indians, and that therefore the district court had no jurisdiction under the QTA or any other statute. Without addressing this argument directly, the court held that "[j]urisdiction is conferred upon the Court by 5 U.S.C. § 706" (Pet. App. 13a). Because the court regarded petitioner as seeking only "a property interest which is rightfully hers" (*id.* at 24a), it directed the Secretary to issue a deed to petitioner for a one-half interest in the decedent's real property as well as an accounting of all rents and profits (*id.* at 27a).

2. The court of appeals reversed (Pet. App. 1a-12a). Citing *United States* v. *Mottaz*, 476 U.S. 834, 842-843 (1986), and *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983), the court reasoned that the QTA by its own terms fails to waive the United States' sovereign immunity for actions challenging the United States' legal title to Indian trust lands, and that the district court could not exercise jurisdiction, as it did, under the Administrative Procedure Act (APA), 5 U.S.C. (& Supp. IV) 551 *et seq.*, because the QTA is the only avenue available for claimants to challenge the government's title to real property. Because there is no cause of action under the APA "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" (5 U.S.C. (Supp. IV) 702(2)), the court of appeals concluded that the district court was without jurisdiction under the APA and 28 U.S.C. 1331. Pet. App. 4a-9a.

The court of appeals also held that, even if the jurisdictional issue had not been dispositive, the district court's judgment still would have to be reversed because the court lacked the authority to override the terms of the decedent's valid will. The court cited this Court's decisions in *Blanset* v. *Cardin*, 256 U.S. 319, 326 (1921), and *Tooahnippah* v. *Hickel*, 397 U.S. 598, 608-610 (1970). Pet. App. 9a-10a.

3. Petitioner contends that the court of appeals erred in holding that her suit was barred by sovereign immunity and in holding that the district court was without authority to override the express terms of Mr. Ducheneaux's will. The decision of the court of appeals, however, is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is not warranted.

a. Petitioner states without explanation (Pet. 6) that the QTA is inapplicable to this case, presumably because of the erroneous belief that petitioner's equitable claim to the trust property is sufficient to divest the United States of its legal title to the trust property. This ignores the well-settled law that the United States has not waived its sovereign immunity to suit when, as in this case, the United States holds legal title to trust or restricted land.

The QTA provides that the United States may be named as a party defendant in a "civil action * * * to adjudicate a disputed title to real property in which the United States claims an interest" (28 U.S.C. 2409a(a)). The QTA, however, expressly does not apply to "trust or restricted Indian lands" (*ibid.*). This exception, the Court has recently observed, "operates * * * to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians" (*United States* v. *Mottaz*, 476 U.S. at 842; see *id.* at 843 & n.6).

In *Block* v. *North Dakota*, 461 U.S. at 286 (footnote omitted), the Court held that "Congress intended the QTA

to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." The Court accordingly rejected the contention that a party could contest the United States' title to real property simply by bringing an action against the responsible federal officer, either under the APA or pursuant to other authority (see *id.* at 280-286 & n.22).[4]

The trust and restricted lands exception to the QTA's waiver of sovereign immunity reflects the government's continuing responsibility for such lands. "By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes." *Florida* v. *United States Dep't of the Interior*, 768 F.2d 1248, 1254 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986); see *Block* v. *North Dakota*, 461 U.S. at 285. If the approach urged by petitioner were adopted, however, any claimant could seek title in probate proceedings, circumventing the QTA and rendering "the Indian lands exception to the QTA * * * nugatory" (*ibid.*).

Petitioner cites several cases (Pet. 7) in an attempt to demonstrate the inapplicability of the QTA's exception for suits involving claims to Indian trust lands. The cases, however, offer no support for her argument. In *Conroy* v. *Conroy*, 575 F.2d 175 (8th Cir. 1978), a divorce action between two members of the same Indian tribe, a tribal court

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[4] With respect to the APA, the Court observed in *Block* v. *North Dakota* that the last sentence of 5 U.S.C. (Supp. IV) 702 states that it confers no authority to grant relief "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The Court concluded that the QTA is an "other statute" within the meaning of this sentence, because the QTA "forbids the relief" sought if the conditions it imposes on Congress's consent to suit are not satisfied (see 461 U.S. at 286 n.22).

divided the trust property between the two spouses. As the court of appeals here stated in distinguishing its own prior decision (Pet. App. 8a), the critical difference between the two cases is that in *Conroy* "the Tribal Court's partition of the trust property between two Indians did not divest the United States of its legal title to the property as trustee, but merely substituted different Indian beneficiaries."[5]

Petitioner, in citing *Bailess* v. *Paukune*, 344 U.S. 171 (1952), misapprehends the import of that decision. In that case, an Indian devised trust property to his non-Indian spouse. *Bailess* merely acknowledged that land so devised loses its character as trust property, and "there remains only a ministerial act for the trustee to perform, namely the issuance of a fee patent to the *cestui*" (*id.* at 173). Here, by contrast, the property in question remains trust property, with legal title vested in the United States, and the decedent has not devised the property to petitioner. In such circumstances, there is no applicable waiver of sovereign immunity to support an action seeking to require the United States to divest itself of legal title and give the property to petitioner.

b. As the court of appeals also correctly held, even if the district court had had a proper basis of jurisdiction its order could not stand. A court is without authority to

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[5] Petitioner (Pet. 7), citing *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), and *Kahn* v. *Shevin*, 416 U.S. 351 (1974), assails this distinction as "rank discrimination." But in *Bakke*, 438 U.S. at 304 n.42, the prevailing opinion specifically distinguished *Morton* v. *Mancari*, 417 U.S. 535 (1974), in which the Court has upheld legislation that singled out Indians for "particular and special treatment." Similarly inapposite is *Kahn*, in which the Court upheld the validity of a Florida statute that granted a property tax exemption to widows but denied it to widowers. The present case does not involve any distinction between widows and widowers: if the decedent had been an Indian woman and the surviving disinherited spouse a non-Indian male, the result would have been the same.

override an Indian's valid will. In *Blanset* v. *Cardin*, 256 U.S. 319, 326-327 (1921), the Court recognized the right of Indians to dispose of their property "free from restrictions on the part of the State as to the portions to be conveyed or as to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior." In *Tooahnippah* v. *Hickel*, 397 U.S. 598, 608-610 (1970), the Court further recognized the limited authority of the Secretary when probating Indian wills, noting that the Secretary himself lacks "the power to revoke or rewrite a will that reflects a rational testamentary scheme with a provision for a relative who befriended the testator and omission of one who did not, simply because of a subjective feeling that the disposition of the estate was not 'just and equitable.' " The district court's order in this case, however, is based on nothing more than subjective feelings about what is just and equitable. As the court of appeals properly held, such an order is improper on the merits.

Petitioner asserts (Pet. 6) that the Secretary improperly failed to modify the decedent's inventory of property to reflect petitioner's claim of entitlement to part of the trust property under a resulting-trust theory. Although 43 C.F.R. 4.273(a) provides for elimination of property from a decedent's inventory when "it is found that property has been improperly included," such claims arise, as the IBIA opinion in this case pointed out (Pet. App. 45a n.4), when "trust property titled to the decedent should have been titled to another, or * * * trust property titled to another should have been titled to the decedent." That, however, was not the essence of petitioner's claim before the agency or in the courts below.

Petitioner quotes (Pet. 5) part of a brief submitted by the Solicitor of the Department of the Interior in response to an IBIA order in this case (Pet. App. 40a) on the issue

of whether resulting purchase money trusts in Indian trust property could be recognized (Solicitor's Office Brief, Dkt. Nos. IBIA 83-53 and 84-4). The IBIA, after considering the Solicitor's views, agreed that, while resulting purchase money trusts in Indian trust land could "be recognized under appropriate circumstances" (Pet. App. 43a), such circumstances did not include a claim by a non-Indian (*id.* at 47a). The Solicitor had also stated that, although an administrative law judge has the authority under Department of the Interior regulations to modify a decedent's estate inventory if sufficient evidence is presented to show improper inclusion of certain assets, "such authority may not extend to curing defects which are based on a resulting trust theory" (Solicitor's Brief 5). Finally, the Solicitor specifically rejected the view adopted by the district court in this case that spousal contributions during marriage could form the basis for a claim under a resulting-trust theory.

Under applicable regulations, the Secretary was without authority to modify the decedent's inventory of property and to override the express terms of the will of the decedent. Petitioner cites *Akers* v. *Morton*, 499 F.2d 44 (9th Cir. 1974), cert. denied, 423 U.S. 831 (1975), in an attempt to show that the mere fact of asserting a claim in the decedent's trust property was sufficient to require the Secretary to modify the decedent's inventory of property (Pet. 7-8). In this case, however, the administrative law judge found no evidence to support petitioner's claim that she owned an interest in the trust property (Pet. App. 31a). Moreover, in *Akers*, an Indian husband had disinherited his Indian wife. There, the trust property had been acquired completely with the wife's funds although title was taken solely in the husband's name. Despite this fact, the wife had not asserted in the probate proceedings that the land had improperly been included in the decedent's inven-

tory of property. After an unsuccessful administrative challenge, the wife sued the Secretary of the Interior. The court of appeals, relying on *Tooahnippah*, rejected the widow's claim, noting that "[t]he Secretary may dispprove a will only if it is technically deficient or if it is irrational" (499 F.2d at 46-47). *Akers* thus supports the ruling of the court of appeals in this case.[6]

The court of appeals correctly held that petitioner's suit was barred by the QTA and that, even without the jurisdictional bar, the Secretary had no authority to override the express testamentary wishes of the decedent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[6] Furthermore, even if a non-Indian spouse inherits an interest in trust property, particularly an interest held jointly with Indian heirs, the property interest held by the non-Indian is very limited. Thus, "[h]e cannot, as a practical matter, manage, use, or lease the land except with the consent and agreement of all his Indian co-owners. His own interest, although free of the trust, is virtually unsaleable unless the trust is lifted as to all of his Indian co-owners upon their request." *Estate of Mary Ursula Rock Wellknown*, 78 Interior Dec. 179, 184 n.4 (1971).

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